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IN THE

Supreme Court of the United States

October Term, 1956.

No. 1331

HOLLAND AMERICAN LINE
(Sued as N. V. Nederlandsch-Amerikaansche
Stoomvaart Maatschappij),
Petitioner,

v.

PHILADELPHIA CEILING AND STEVEDORING
COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

T. E. BYRNE, JR.,
Counsel for Petitioner.

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Stephen P. Gaudy,
Ballard, Spahr and Byrne,
Of Counsel.

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(SUED AS N. V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MAATSCHAPPIJ),
Petitioner,

v.

PHILADELPHIA CEILING AND STEVEDORING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Holland-American Line, respectfully prays that this Honorable Court may grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review a final judgment of that Court entered October 13, 1966.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit, dated October 13, 1966, is not yet reported. The opinion of the District Court, dated May 12, 1965, is not yet reported. For the convenience of the Court, the opinion of the District Court is reproduced as part of an appendix to this Petition, 1a, and the opinion of the Court of Appeals and its order on rehearing are reproduced, 5a, 11a.

JURISDICTION.

(a) Jurisdiction to consider the within Petition is conferred upon this Court by 28 U. S. C. A. 1254(1).

(b) The judgment of the Court of Appeals for the Third Circuit affirming (2 to 1) the judgment of the District Court in favor of the Respondent and against the Petitioner was entered October 13, 1966.

(c) Pursuant to the Rules of the Court of Appeals, a timely petition (15 days) for rehearing before the Court *en banc* was filed. On November 28, 1966, the Court of Appeals granted the petition for rehearing. Reargument was scheduled before the Court *en banc*. At rehearing, eight judges sat. On December 28, 1966, the Court of Appeals affirmed the judgment of the District Court, the judges who heard the matter on rehearing being equally divided.

(d) A second petition for rehearing was filed within 15 days. It requested that the Court designate one or all of the three Senior Judges of the Circuit to sit so as to constitute a Court with an uneven number of judges so that the matter could be decided. The second petition for rehearing was denied February 16, 1967.

(e) Because it was unclear whether the time to file the within petition ran from December 28, 1966 or from February 16, 1967, Petitioner filed and Mr. Justice Brennan entered an order upon Petitioner's motion for enlargement of time. Under the order entered by Mr. Justice Brennan the time within which the Petition for Certiorari in this case might be filed was extended to April 27, 1967.

QUESTION PRESENTED.

In a shipowner's indemnity action against a stevedore, which arises out of a judgment obtained by a longshoreman against the shipowner; and where there is no conflicting evidence as to the factual condition which existed, is not the shipowner entitled to an instruction to the jury that if the jury finds that a dangerous condition improperly created by the stevedore during the performance of its work was causally related to plaintiff's injury, the jury must return a verdict in favor of the shipowner on its indemnity claim.

STATEMENT OF THE CASE.

Jones, a longshoreman, sued Holland-American Line (shipowner) for personal injuries sustained by him during the course of his work as a longshoreman discharging cargo from one of the Petitioner's vessels. Petitioner, the original defendant, joined Jones' employer as a third-party defendant, claiming indemnity.

The cargo being unloaded at Philadelphia was peat moss in bales. It was undisputed that at the commencement of the unloading operation, there was no accumulation of loose peat moss. As the Court of Appeals stated it, "as work progressed loose peat moss flaked off or was loosened by the longshoreman's hand hooks and accumulated in the hold of the vessel. Plaintiff claimed that he sustained his injury when he stepped into an open bilge box in the hold which was concealed by an accumulation of loose peat moss". (Slip Opinion, Page 2) (Appendix, p. 6a).

At the conclusion of the plaintiff's case, the shipowner conceded its liability to him. Submitted to the jury were the issues of the amount of the damages sustained by the plaintiff (found to be $45,000.00) and the issue of whether the shipowner was entitled to be indemnified by the stevedore.

The evidence as to the accumulation of peat moss in the hold was uncontradicted. Plaintiff, the only witness to the precise manner in which the accident occurred, testified that the accumulation of peat moss in varying depths completely obscured the floor of the compartment in which the cargo had been carried. He testified that it was not possible for him to see the floor upon which he was walking (11a), the loose peat moss floated on the water within the bilge well so that the opening which was usually covered by the steel plate was completely obscured by the accumulation of peat moss. According to the plaintiff, this

amounted to "a foot in some places, in some places there was more of the loss peat moss and we . . . and I didn't see the floor at all" (11a). Jones' version of what happaned [there was no other] was as follows:

> "So about 3:30 or quarter to 4—I don't know the specific time—we were almost done. I had about one bale left I had—I had to get in my end, and I walked to get this bale, and all of a sudden my leg disappeared into the peat moss, and as I—my leg disappeared, I twist my back and my right leg went out from under me and I hit my back up against a steel beam." (10a)

The fact that an accident had occurred came to the Chief Mate's attention when he saw the injured Jones on the ship's main deck with one leg wet. The Mate immediately surmised what had occurred. When he went into the cargo compartment, in spite of the fact that he knew precisely the location of the bilge well, he had to search for the perforated steel plate intended to cover it by running his fingers through the moss and he finally found it by groping for it in the peat moss. He could not see the floor of the tank (23b) and even though he knew precisely the location of the bilge well, he was unable to observe it (29⅜a).

The record is clear that there had been no accumulation of peat moss when the longshoremen began the unloading operation. An expert stevedore, called as a witness by the Petitioner, testified that it was improper stevedoring practice to have permitted an accumulation of peat moss or any other cargo which obscured the surface upon which the men had to walk. When the testimony of Jones, the plaintiff, and the Chief Mate (the only two witnesses to testify on this subject) was outlined to the stevedore foreman in charge of the work, he testified:

> "If it [the accumulation of peat moss] was that high, it would have to be removed." (40a)

At the close of the evidence, the Petitioner-Shipowner submitted written requests for charge, including one reading as follows:

> "Under all of the evidence, if you find a verdict in favor of the plaintiff against Holland-American Line, and you find that the accumulation of loose peat moss in the bottom of the tank was a cause or a contributing cause in bringing about the injury to Mr. Jones, then you must find a verdict in favor of Holland-American Line against Philadelphia Ceiling and Stevedoring Company." (57a)

The District Court denied that request for charge. Instead it submitted the case to the jury under a charge which several times reiterated "you (the jury) again are the super-expert" (52a). The District Court specifically stated to the jury that in spite of the evidence in the record, as outlined above:

> "You again are the experts. You have to determine how much peat moss is expected to be found in a tank such as this one, how much should be allowed to accumulate before you determine that it should be removed? You have to make that determination. (52a)
>
> * * *
>
> "But if you find that the Philadelphia Ceiling performed its work of discharging the cargo in a good and workmanlike manner, if you find that the proper performance of the work did not require prevention or avoidance of an accumulation of loose peat moss, or if you find that proper and workmanlike performance did not require the removal of an accumulation of peat moss . . . then you should find that . . . (the stevedore) . . . breached no duty to Holland-American . . . and in that event, you should return a verdict in favor of the third-party defendant, Philadelphia Ceiling, against the third-party plaintiff, Holland-American Line." (52a-53a)

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The Court of Appeals for the Third Circuit, sitting *en banc,* which has much maritime litigation before it, has divided equally upon the question of what is the applicable law with respect to the duties owing as between stevedore and shipowner and the proper standard for instructing a jury in a case of that nature. The frequent recurrence of litigation of this type within the Third Circuit requires the guidance of this Court.

II.

The approach of the Court of Appeals for the Third Circuit in this and other cases is in conflict with decisions of this Court and of other Courts of Appeals.

BRIEF IN SUPPORT OF PETITION.

The approach of the Third Circuit to indemnity actions in maritime cases of this type has been consistently at odds with the approach of other Courts of Appeals.

In spite of the frequent holding by this Court that in indemnity actions such as the one now before the Court, the contract standard is applicable and a tort standard inappropriate, nevertheless, the Court of Appeals for the Third Circuit and the District Judges within that Circuit consistently view these cases as if a tort standard prevailed and juries in these actions are instructed to return their verdict based upon a tort rather than a contract standard.

That the Court of Appeals for the Third Circuit has not sailed a consistent course in shipowners' indemnity actions is demonstrated by its prior decisions. *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477 (C. A. 3, 1956) was probably the first of a long line of decisions where breach of a contract for workmanlike service was equated with negligence. Contract interpretation is for Courts and Courts are to instruct juries as to the proper interpretation of the contract so that the jury may apply the facts it finds under the guidance of correct rules of law. If a contract requires a party to perform work in a certain fashion, the fact that one party introduces the testimony of an expert as to what constitutes proper performance is not, in the absence of a proper instruction to the jury, something which "must pass through the screen of the jury's judgment of credibility" (Slip Opinion, Page 3).

The evidence left no doubt that an accumulation of peat moss existed which obscured the walking surface and, of course, obscured the opening into the bilge well. Every person experienced and expert enough to express an opinion, both Petitioner's witness and Respondent's foreman, an acknowledged expert, agreed that if the condition described by the fact witnesses had existed, it was improper and should have been rectified before work continued.

Yet the District Judge charged and the Court of Appeals affirmed that the jury was "to determine how much peat moss is expected to be found in a tank, such as this one, how much should you allow to accumulate before you determine that it should be removed?" (R-52a). So an admitted breach, under the evidence, was tossed into the lap of the jury for consideration without a proper instruction as to the standard the jury was to apply.

In its 1956 decision in *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477, the Third Circuit clearly and admittedly applied a tort standard in denying a shipowners' indemnity claim. The rationale of its decision was based upon this Court's 1905 decision in *Union Stock Yards v. Chicago B&Q R. Co.*, 196 U. S. 217, a tort case. The Court of Appeals there said:

> "Where the parties have violated similar duties to the injured person, neither is entitled to relief against the other." 237 F. 2d at 482.

There was not unanimity in the Third Circuit even in those days. Chief Judge Biggs and Judge Maris dissented on petition for rehearing. 237 F. 2d 483.

In 1961, in *Hodgson v. Lloyd Brasileiro Patrimonio Nacional v. Murphy Cook & Co.*, 294 F. 2d 32, the Court again approved indemnity on a tort rather than a contract standard. Again dissenting on rehearing, Chief Judge Biggs pointed out:

> "In view of Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, and Waterman Steamship Corp. v. Dugan & McNamara, Inc., 360 U. S. 421, it would seem inevitable that we reappraise our decision in Hagans . . ."

It is impossible to reconcile two more recent Third Circuit decisions involving indemnity. Compare the opinions in this case and in *Thompson v. Trent Maritime*, 353 F. 2d 632, particularly at 651 (C. A. 3, 1965) with *Dziedzina v. Dolphin Tanker Corp.*, 361 F. 2d 120. In the *Dolphin Tanker* case the Third Circuit seemed to reverse its prior

trend and bring itself more in line with the decisions of this Court and other Courts of Appeals, but the change lasted only from May 24 to October 13, 1966.

So in the Third Circuit the result depends upon the composition of the panel which happens to be assigned to hear a particular case. The panel in the *Dolphin Tanker* decision (decided after argument but before decision in this case) clearly followed what we believed to be the teaching of this Court's decisions which culminated in *Italia Societa v. Oregon Stevedoring,* 376 U. S. 315 and the earlier decisions by this Court which are cited in support of the *Italia Societa* decision.

In the case at bar we are dealing with a case where the evidence clearly and without contradiction demonstrated a condition which constituted a breach of the stevedore's contractural obligation. Yet the District Court refused to charge the jury that if it found that condition was a substantial factor in bringing about the harm to the plaintiff, indemnity would lie. There were not, as the District Court's decision would have one believe, "various versions of how it [the work] ought to be done". The decision of the Court of Appeals is clearly at variance with the decision in and the rationale underlying the Second Circuit's decision in *Mortensen v. Glittre,* 348 F. 2d 383, and other decisions by the Court of Appeals for the Second Circuit cited in the following quote:

> "This warranty of workmanlike service comprehends the carrying out of the operations provided for in the contract in a reasonably safe manner. *Waterman S. S. Co. v. Dugan & McNamara,* 364 U. S. 421, 423, 81 S. Ct. 200, 5 L. Ed. 2d 169 (1960). It imposes a duty on the stevedore or contractor to clean up the area of operations, where necessary, to make it a safe place in which to work. *Nicroli v. Den Norske Afrika,* 332 F. 2d 651, 655-656 (2d Cir. 1964); *DeGioria v. United States Lines Co.,* 304 F. 2d 421, 423-424 (2d Cir. 1962). Since there was no evidence of conduct on Glittre's part which

relieved Federal of its obligations, the District Court properly held that Glittre was entitled to indemnification as a matter of law, for the breach of warranty in failing to take steps to rectify a known hazardous condition and eliminate a foreseeable risk of injury which brought into play the vessel's unseaworthiness, and which was a proximate cause of the accident which occasioned the shipowner's expense." 348 F. 2d 383.

If this Court meant what it said in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 335 U. S. 564, then clearly the decision of the Court of Appeals in this case is at odds with this Court.

The Third Circuit approach to indemnity has been specifically rejected by the Ninth Circuit in *Matson Terminals, Inc. v. Caldwell,* 354 F. 2d 681 (1965), and just as clearly but not so specifically by the Fifth Circuit. *D/S OVF SKOW v. Hebert,* 365 F. 2d 341 (1966). The views of the various Courts of Appeals are set out in "Admiralty Law in the Fifth Circuit", by Carl O. Bue, Jr., 4 Univ. of Houston Law Review, 350 at 416 (F. N.).

If the perforated cover over a bilge well is inadvertently and unexplainedly missing, that may impose liability upon the shipowner. Nevertheless, the stevedore who so conducts his operations as to cover up and conceal that condition is clearly "calling into play" the unseaworthy condition of the ship with resultant injury to both the injured longshoreman and the shipowner who must respond to the longshoreman in damages. That is clearly the rationale of this Court's decision in *Weyerhaeuser v. Nacirema, supra; Crumady v. Fisser,* 358 U. S. 423; and *Waterman v. Dugan & McNamara, Inc.,* 364 U. S. 421.

In *Atlantic & Gulf Stevedore v. Ellerman Lines,* 369 U. S. 355 (1962), this Court made it clear that a jury's verdict is controlling where an issue has been resolved by the jury if, but only if,

(a) There are disputed issues of fact to be resolved; and

(b) The charge of the Court to the jury states properly the applicable law.

The *Ellerman* decision and this Court's quotation of *Byrd v. Blue Ridge Rural Electric Corporation,* 356 U. S. 525 at 538, 539, teach that it is *where there are disputed fact questions* to be resolved that the Seventh Amendment fashions the Federal policy favoring jury decision. By the same token, where there is not a disputed question of fact, the Court should instruct the jury as to the law applicable to the facts which it does find.

The Second Circuit has, we submit, properly construed the decisions of this Court and an example of it is in its language in *Mortensen v. Glittre,* 348 F. 2d 383 where that Court said:

> "Since there was no evidence of conduct on Glittre's part which relieved Federal of its obligations, the District Court properly held that Glittre was entitled to indemnification as a matter of law, for the breach of warranty in failing to take steps to rectify a known hazardous condition and eliminate a foreseeable risk of injury which brought into play the vessel's unseaworthiness, and which was approximate cause of the accident which occasioned the shipowner's expense." 348 F. 2d 383.

There is no way in which one can reconcile the Second Circuit Court's decision in *Mortensen* and in the case at bar. The two are diametrically opposed, for had the law in *Mortensen* been applied by the Court of Appeals in this case (as half of the Court thought it should be) the result would have necessarily been the same as the result in *Mortensen.*

CONCLUSION.

One of the Courts of Appeals is evenly divided on a question which frequently recurs in that busy Circuit. We think we have demonstrated that earlier decisions of the Third Circuit, which undobutedly have influenced half of the judges against the position for which Petitioner argues, are entirely inconsistent with decisions in other Circuits and with decisions by this Court. A tort standard of conduct is not the proper instruction to give a jury in an indemnity action. It is for the Court to interpret the contract and instruct the jury as to the law which the jurors shall apply their fact findings. Since there was no evidence of proper performance by the stevedore here, the only question open was causal relationship. That should have been submitted to the jury as Petitioner requested and as half of the Court of Appeals believes should have been done.

Certiorari should be granted for all the reasons stated herein.

Respectfully submitted,

T. E. Byrne, Jr.,
Counsel for Petitioner.

Robert K. Wood,
Joseph P. Green,
Krusen Evans and Byrne,
Of Counsel.

Appendix.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 29600.

ROBERT JONES

v.

NEDERLANDSCHE AMERIKKANSH STOOMVAART MAATSCHAPPIJ, N. V.

v.

PHILADELPHIA CEILING & STEVEDORING CO.

OPINION.

May 12, 1965.

LUONGO, *J.*

While unloading peat moss from defendant's vessel, Robert Jones, a longshoreman, stepped into a bilge box from which the lid was missing and was injured. He sued defendant ship-operator, alleging that his injury was caused by an unseaworthy condition and by defendant's negligence in failing to provide him with a safe place to work. Defendant brought in the stevedore as a third-party defendant, seeking indemnification for breach of the warranty to perform the cargo discharging operation in a proper and workmanlike manner.

At the conclusion of Jones' case, defendant conceded liability for the unseaworthy condition resulting from the displaced bilge box lid and the jury awarded damages to Jones in the amount of $45,000. Judgment on that verdict has been satisfied. In the third-party proceeding, the jury returned a verdict in favor of the third-party defendant. It is that verdict which the defendant ship-operator has moved to set aside.

Defendant sought to establish the stevedore's improper performance on two grounds: (a) that the use of cargo hooks in the unloading of the bales of peat moss was improper and (2) that the stevedore permitted an unreasonable accumulation of loose peat moss on the floor of the tank where the longshoremen were working. It was defendant's position that the use of hooks on these bales created the loose peat moss and that the accumulation of loose peat moss in the working area was so great that it concealed the admittedly unseaworthy condition, preventing Jones from seeing and avoiding it, and preventing the stevedore from discovering and correcting it.

Defendant's complaint is that the court erred in submitting to the jury the question whether there was proper performance of the work by the stevedore. In that contention it relies upon the testimony of plaintiff Jones that there was an accumulation of 10 to 12 inches of loose peat moss in the working area, and the testimony of Coyle, third-party defendant's ship foreman, that assuming an accumulation of the degree testified to by Jones, proper performance of the work would have required removal of the loose peat moss before proceeding with the unloading operation. With such testimony in the case, defendant contends that there was nothing to submit to the jury on the performance issue and that the court should have declared as a matter of law that the work was improperly performed.

The testimony which defendant relies on was oral. The credibility of oral testimony, even if uncontradicted, is for the jury which is free to accept or reject it.

> "Such an approach towards uncontradicted evidence is firmly rooted in the policy of the law of evidence. As Wigmore has pointed out, '*the mere assertion of any witness* does not of itself need to be believed, *even though he is unimpeached* in any manner; because to require such belief would be to give a quantitative and impersonal measure to testimony.'" *Rhoades, Inc. v. United Air Lines, Inc.*, 340 F. 2d 481, 485 (3d Cir. 1965), quoting from 7 WIGMORE, EVIDENCE § 2034 (3d ed. 1940) (Italics in original.)

In this case, the testimony referred to was not uncontradicted. There was disagreement as to the degree of accumulation of loose peat moss. Jones testified that there was as much as 10 to 12 inches on the floor of the tank, whereas Aalbert Mulder, the vessel's Chief Officer, who was called as a witness by defendant, testified that when he went into the tank immediately after Jones sustained the injury, he felt around for the bilge box lid and estimated that there was approximately 2 to 3 inches of loose peat moss in the area of the bilge box. Moreover, although Coyle testified that an accumulation such as testified to by Jones would have required removal of the loose peat moss, considerable doubt was cast on whether in fact such an accumulation existed by Coyle's further testimony that if there had been such an accumulation the hatch foreman would have requested authorization to remove it, and no such request was made.

There was also a conflict in the testimony as it related to the use of cargo hooks on the bales of peat moss. There was some testimony in support of defendant's position that the use of cargo hooks was improper, and there was other testimony indicating that the use of cargo hooks was not only proper, it was essential to the discharge of such cargo.

In the face of such conflicting testimony, the court submitted to the jury for its determination: (a) what constituted proper performance of the work of unloading a

cargo of peat moss; (b) whether the third-party defendant had or had not performed in accordance with that standard; and (c) if the third-party defendant had failed so to perform, whether such failure was a substantial factor in causing Jones' injury. All these were matters peculiarly within the jury's province. The jury, on the evidence before it, could have concluded that the handling of the bales of peat moss necessarily caused a certain amount of loose peat moss, that proper performance of the work required removal only when the accumulation was excessive, and that the accumulation of loose peat moss here was within the limits of proper and workmanlike performance of the work.

These matters were properly for the jury and were so submitted under instructions to which no exception was taken. There is ample support for the jury's resolution of those issues in favor of the third-party defendant, and I am not free to substitute my view of the evidence for the jury's.

Defendant's motion to vacate and set aside the judgment in favor of the third-party defendant will be denied.

ORDER.

AND NOW, this 12th day of May, 1965, it is ORDERED that the motion of Nederlandsche Amerikkansch Stoomvaart Maatschappij, N. V., otherwise known as Holland-American Line, defendant and third-party plaintiff, to vacate and set aside the judgment in favor of Philadelphia Ceiling and Stevedoring Co., third-party defendant, be and it is hereby DENIED.

ALFRED L. LUONGO, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15469

ROBERT JONES

v.

N.V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MAATSCHAPPIJ,
Appellant

v.

PHILADELPHIA CEILING AND STEVEDORING COMPANY,
3d Party Defendant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 12, 1966

Before McLAUGHLIN, GANEY and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed October 13, 1966)

FREEDMAN, *Circuit Judge.*

A longshoreman brought suit against the owner of a vessel to recover damages for personal injuries caused by the unseaworthiness of the vessel. He was employed by the stevedore to discharge a cargo consisting of bales of

peat moss. As work progressed loose peat moss flaked off or was loosened by the longshoremen's hand hooks and accumulated in the hold of the vessel. Plaintiff claimed that he sustained his injury when he stepped into an open bilge box in the hold which was concealed by an accumulation of loose peat moss.

The owner of the vessel claimed that the stevedore, which it brought in as a third-party defendant, was liable over to it for breach of the warranty of workmanlike service. It asserted that the cover of the bilge box had been removed by representatives of the stevedore and that it was they who had created the unseaworthy condition. At the conclusion of the longshoreman's case, however, the shipowner conceded its liability. The jury ultimately returned a directed verdict in favor of the longshoreman against the shipowner in the amount of $45,000, but found in favor of the third-party defendant. It is from the judgment against it as third-party plaintiff that the shipowner has taken this appeal. We shall for convenience refer to the shipowner as the plaintiff and to the stevedore as the defendant.

The verdict of the jury establishes that in its view the work conducted by the stevedore had not gone forward in an unsafe or unworkmanlike manner even though peat moss had been permitted to accumulate. It is true that such an accumulation, however slight, when sufficient to cover the surface of the hold, might obscure dangers, but none of the witnesses testified that this would constitute an unsafe or workmanlike practice. There are some risks which are inherent in the nature of the activity.

Plaintiff's claim is more directly focused on the assertion that its expert testified that the only safe and proper method of stevedoring was to remove the scattered peat moss by shoveling it into a net covered with burlap or canvas and then having it dumped or removed. It concedes that if there had been any evidence to controvert such an expert opinion it would have created a factual

issue for the jury. The argument falls under the weight of the concession. For the opinion of an expert even if uncontradicted is not conclusive and a jury is not required to accept it. Such testimony must pass through the screen of the jury's judgment of credibility. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944); *Rhoades, Incorporated v. United Air Lines, Inc.*, 340 F. 2d 481 (3 Cir. 1965); *Wooley v. Great Atlantic & Pacific Tea Company*, 281 F. 2d 78 (3 Cir. 1960).

Moreover, the testimony of plaintiff's expert would not justify a finding that any accumulation of loose peat moss would have constituted an unsafe or improper stevedoring practice. Originally he was asked to assume that as the operation progressed peat moss had accumulated to perhaps 6 inches and in some places even deeper, and that at one time an accumulation had been shoveled into a pile which reached as high as the courtroom doorway. This, he said, would not be a proper or safe stevedoring practice. On cross-examination he was asked how much of an accumulation of loose peat moss would make the use of a net necessary. He answered, "a couple of inches". It is clear, therefore, that the testimony of plaintiff's expert would not condemn as unsafe practice the smallest accumulation of loose peat moss but only one where at least a couple of inches had been permitted to accumulate without being moved. Even if this were accepted by the jury as the standard of a safe and proper practice it would not inevitably follow that the defendant was shown to have breached its warranty. For replete in the testimony of every witness is the characterization of the circumstances which shows that the accumulation varied. Thus, the chief officer of the vessel testified there was about a foot of accumulated peat moss under the coaming but that it was not of a uniform depth throughout the hold. When he found the cover immediately after the accident it was below an accumulation of only 2 or 3 inches of peat moss. The evidence of a number of witnesses, including the original

plaintiff, shows that the peat moss was shoveled away and the jury may well have believed that this was adequate while the work was in progress.

The case therefore is not susceptible of reduction to a mathematical equation in which it may be said that the maximum allowable accumulation was conclusively shown and the witnesses on both sides agreed that the actual accumulation exceeded this amount. It is rather one in which the jury was not required to accept the expert's opinion and where, moreover, even if it had done so it could not be said to have disregarded all of the evidence in concluding that the standard was not violated.

The factual variations in the evidence, the testimony of the defendant's foreman that those working at the job did not consider the accumulation sufficiently great to require removal, all made the question of the adequacy of the stevedore's performance of its work a matter which was peculiarly for the jury to determine.

The judgment of the court below therefore will be affirmed.

McLaughlin, *Circuit Judge,* dissenting.

In this unnecessarily complicated case, the trial judge, on the mistaken idea that there was contradictory factual evidence regarding the stevedore's negligence respecting the accumulation of peat moss on the floor of the tank, submitted that issue to the jury. The court did accurately confine the negligence problem to the peat moss accumulation. The removal of the cover itself over the hole in the hold does not enter into the situation before it. It was the concealment of the hole by the loose peat moss which prevented the plaintiff Jones from seeing it and caused him to inadvertently step into the hole and to fall.

Jones was the sole witness who testified about the state of the tank before he fell. He said that "* * * on

the floor itself there was about a foot of peat moss, * * * in some places there were more, of loose peat moss, and we—*and I didn't see the floor at all.*" *Asked "Was it possible to see the floor?" Jones replied, "No, sir, it wasn't."* (Emphasis supplied). Describing the accident he said that "I was going back to get the last one (bale), when my leg disappeared in the peat moss, and as my left leg went in, my right leg went out from under me, and I, of course, had lost my complete balance." The trial judge misunderstood the evidence of the ship's Chief Officer Mulder who inspected the tank immediately after Jones' fall. The Chief Officer said that in the center of the tank where the opening was, the depth of the peat moss, *"I would say was about a foot."* (Emphasis supplied). By groping around he found the cover and *asked how much peat moss was on the top of it,* he answered, "Two or three inches." It was this latter figure that the judge mistakenly noted as testimony from Mulder "that there was approximately 2 to 3 inches of loose peat moss in the area of the bilge box."

An expert stevedore testified that it was not proper, safe stevedoring practice to allow loose peat moss to accumulate as had been testified to (and not denied), during discharge of such cargo. The stevedore-foreman on this particular unloading, testifying on behalf of the Philadelphia Company, stated that "We move peat moss if it gets too deep * * *." His method of removal was substantially that of the above mentioned expert.

It seems to me that soundly and fairly all of the fact evidence in this trial pointed to the glaring proximate fault of the stevedore company in the discharge of the peat moss cargo. That result cannot be impugned by the attempted brushing aside of the expert's testimony as opinion evidence. The hard fact that plaintiff was hurt through the inexcusable carelessness of the stevedore was not dependent on acceptance or rejection of the clearly right judgment of the expert. He merely rounded out the entirely, undis-

puted factual showing of just what had caused plaintiff's fall. His testimony was at most collaterial to the dispositive proof of the stevedore's responsibility for the accident. On countless occasions negligence questions are, as they should be, referred to a jury but there are trials, of which this appeal is a prime example, where the evidence demands affirmative action from the court as a matter of law.

I would reverse the judgment of the district court.

OPINION OF THE COURT OF APPEALS ON REHEARING

(Filed December 28, 1966)

Reargued December 20, 1966

Before STALEY, *Chief Judge*, MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH, FREEDMAN and SEITZ, *Circuit Judges*

PER CURIAM:

The judges who heard the appeal on reargument being equally divided, the judgment of the district court will be affirmed.

JUDGMENT ON REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ORDERED and ADJUDGED by this Court that the judgment of the said District Court, filed December 7, 1964, be, and the same is hereby affirmed with costs.

FILED
MAY 24 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966.

No. 1331

HOLLAND AMERICA LINE
(Sued as N. V. Nederlandsch-Amerikaansche Stoomvaart Mattschappij),

Petitioner,

v.

PHILADELPHIA CEILING AND STEVEDORING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No.

HOLLAND AMERICA LINE
(SUED AS N. V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MATTSCHAPPIJ),

Petitioner,

v.

PHILADELPHIA CEILING AND STEVEDORING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (Pet. 1a-4a)[1] is not yet reported. The majority opinion of the Court of Appeals for the Third Circuit (Pet. 5a-8a), and the dissenting opinion (Pet. 8a-10a) are not yet reported. The order of the Court en banc of the Court of Appeals for the Third Circuit was entered on December 28, 1966. A second petition for rehearing was denied on February 16, 1967.

JURISDICTION.

The jurisdictional requisites are set forth adequately in the Petition, except for the failure to state that there is no basis in the applicable Rules of the Court of Appeals for the Third Circuit for filing a second petition for rehearing. Further, the date of the filing of the Motion for enlargement of time is not set forth.

1. "Pet." refers to the Petition for Writ of Certiorari filed on behalf of Holland America Line.

QUESTIONS PRESENTED.

Petitioner, Holland America Line (Ship), sought indemnity from the Respondent, Philadelphia Ceiling & Stevedoring Company (Stevedore), in a third-party action after a jury found for the plaintiff longshoreman against the Petitioner, Ship. The longshoreman had stepped into a bilge well hole which had no cover on it. The Ship conceded unseaworthiness. In the third-party action the Ship did not move for a directed verdict and took no exceptions to the charge of the Trial Judge. The Jury found in favor of the Stevedore. The Trial Judge, the majority of a three judge panel of the Court of Appeals for the Third Circuit and the en banc Court of the same Court of Appeals refused to substitute their judgment for that of the jury since there was a view of the evidence consistent with the jury's verdict. Therefore, the questions presented are:

1. Should this Court issue its writ of certiorari to consider the question whether the Court of Appeals should have substituted its judgment for that of the jury when there was a view of the evidence consistent with the jury's verdict, and in light of this Court's decision in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355.

2. Should this Court issue its writ of certiorari to consider the question as to whether Ship should have been granted a new trial when its original motion on appeal was limited to the contention that there were no disputed issues of fact, when it did not move for a directed verdict, and when the jury considered all the evidence following a charge to which no exception was taken?

3. Should this Court issue its writ of certiorari in every case of alleged importance merely because a Circuit Court of Appeals sitting en banc with an even number of judges divides evenly on the question, and where there is no conflict in the decisions of the particular circuit or with decisions of other circuits?

STATEMENT OF THE CASE.

Robert Jones was injured on January 5, 1961, while working as a longshoreman for the Respondent, Stevedore. These were the circumstances.

Stevedore was employed by Ship to discharge peat moss from its ship, the Sommelsdyk, while she was in Philadelphia.

The peat moss was located in one of the deep tanks in No. 3 hold. The deep tank was 21 feet long and about 30 feet wide and 18 feet deep (16b).[2] About 712 bales of peat moss were stowed in the deep tank in which Robert Jones was working. As the discharge operation progressed, loose peat moss accumulated. At some point in time, loose peat moss was "stacked" as high as a door (in the court room) in some places in the tank (3b). When the tank was empty, except for a bale or two, Jones went to get one of them and his leg disappeared into the peat moss. His other leg went from under him and he suffered a back injury (3b). His leg descended into a hole up to his knee and when his leg came out it was wet (4b). He had fallen into a bilge well from which the cover had been removed. The loose peat moss was described as looking like dried out tobacco (4b), and the deck of the tank was not visible.

The chief officer, Aalbert Mulder, saw Jones on the weather deck, observed his wet leg and went to investigate. He found the bilge well covering without difficulty. The area was covered by loose peat moss to a depth of about two or three inches. While looking for the bilge well lid, his finger tips were on the deck of the tank (21b-22b).

Jones sued Ship claiming his injuries were caused by the unseaworthiness of the Ship and the negligence of its

2. The page references are to the original record as contained in Respondent-Appellee's Appendix filed in the Third Circuit Court of Appeals, copies of which were reported filed by Petitioner.

personnel. Ship joined Stevedore, claiming indemnity in the event of its liability.

The suit was tried before Judge Luongo and a jury. At the trial, in addition to the evidence referred to above, Ship, in the prosecution of the third-party action, offered the testimony of an expert concerning the proper method of discharging peat moss. When all the evidence was in, Ship did *not* ask for a directed verdict against Philadelphia Ceiling.

Before counsel for the parties made their closing speeches to the jury, the Trial Judge held a conference of counsel in chambers. During this conference, Ship conceded that its vessel was unseaworthy (55b-57b). The jury was charged and, after he had finished, the Trial Judge asked for exceptions or additions to the charge (77b). Ship's only exception related to Jones' life expectancy (78b). No exception was taken to any part of the charge relating to the liability vis-à-vis third-party plaintiff and third-party defendant.

The jury deliberated for a number of hours, and sought additional instructions concerning the admission of unseaworthiness by Ship. Finally, the jury returned a verdict in favor of Robert Jones against Ship and in favor of Stevedore in the third-party action.

The Trial Judge denied Ship's motion for a new trial and affirmed the verdict of the jury in favor of the Stevedore. On appeal, the Court of Appeals affirmed setting out at length in their opinion the many fact issues that were properly left to the jury. Finally, the Court en banc of the Court of Appeals for the Third Circuit—eight judges sitting—affirmed the judgment of the District Court. Ship's petition for a second rehearing was denied.

The Petition to this Court followed.

ARGUMENT.

I. This Case Involves Only the Well-Settled Issue of the Unconstitutionality of a Court Re-examining Facts So as to Substitute Its Judgment for That of a Jury, When There Is a View of the Evidence Consistent With the Verdict of the Jury.

This Court has spoken definitively concerning this fundamental mandate, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., supra; Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360; *Dick v. New York Life Ins. Co.*, 359 U. S. 437.

The opinions of the District Court (Pet. 1a-4a) and the Court of Appeals (Pet. 5a-8a) set out cogently that the jury had to resolve conflicts between Ship's witnesses and Stevedore's witnesses. The jury had to resolve a number of crucial facts: Did the longshoreman remove the bilge well lid? Was the misplaced bilge well lid a condition which a cursory examination by the stevedore would have disclosed? How much loose peat moss was there? Were cargo hooks used to dislodge the bales? Was the performance of the stevedore company a substantial factor in bringing about the plaintiff's injury? Was the work of the stevedore carried out in a safe and efficient manner?

The petitioner would urge upon this Court that there was no conflict in the evidence before the jury. This argument has been rejected by three judicial bodies.

The Court of Appeals in the instant case acted properly in refusing to reverse the unanimous verdict of the jury. To have done otherwise would have been a violation of the Seventh Amendment to the Constitution of the United States and would have been improper under the rulings of this Court.

II. Even if This Court Had to Reach the Issue of Whether or Not There Was a Disputed Fact Issue for the Jury, the Petitioner Failed to File a Motion for Directed Verdict as Required by Rule 50(b) and Did Not Except to Any Relevant Portion of the Trial Judge's Charge; Therefore the Lower Courts Were Not Bound to Examine the Legal Issues Purportedly Raised.

The petitioner argues to this Court that there were no disputed issues of fact (Pet. 11, 12) and that realistically, a directed verdict was in order at the trial of this case. Yet, a motion for a directed verdict was never filed nor was there any exception taken to the charge of the Trial Judge.

It is now well settled that a Motion for Judgment notwithstanding the verdict may be entertained only if the movant has made a motion for a directed verdict at the close of all the evidence, and that a mere request for binding instructions in points for charge is not a substitute for compliance with Rule 50, *Budge Manufacturing Co. v. U. S.*, 280 F. 2d 414 (3rd Cir., 1960); *Mutual Ben. Health & Acc. Assn. v. Thomas,* 123 F. 2d 353 (8th Cir., 1941); see also *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212.

Rule 50 requires that the motion for a directed verdict be filed at the close of the evidence offered by an opponent and that such motion "shall state the specific grounds therefor" (Rule 50(a)). As heretofore noted, no such motion was filed at the close of Petitioner's evidence, nor indeed at any time during the trial.

A Motion for Judgment notwithstanding the verdict may be entertained only if the movant has duly made a motion for a directed verdict in accordance with Rule 50, *Mutual Benefit Health & Acc. Assn. v. Thomas, supra.* Hence, a party who fails to move for a directed verdict at the close of all the evidence cannot present to the trial court a question as to the legal sufficiency of the evidence to support a verdict for his opponent by a motion for

judgment notwithstanding the verdict or raise the question on appeal, *Mooman v. Reading Co.*, 66 F. Supp. 636, aff'd. 156 F. 2d 678 (3rd Cir., 1946); *Aetna Casualty and Surety Co. v. Yeatts*, 122 F. 2d 350 (4th Cir., 1941); *Dickerson v. Franklin Nat. Ins. Co.*, 130 F. 2d 35 (4th Cir., 1942).

Since it is clear that no mention for directed verdict pursuant to Rule 50 was ever filed by Petitioner, it would have been error for the Court of Appeals to consider the Petitioner's right to judgment n.o.v. on any ground or to direct the District Court to enter judgment for Petitioner.

For purposes of appeal, a motion for a directed verdict is necessary to raise the legal question of the sufficiency of the evidence or the propriety of the jury's findings, *Budge Mfg. Co. v. U. S., supra.*

When a party allows a case to go to the jury without challenging the sufficiency of the evidence by a motion for a directed verdict, the appellate court is powerless to review the sufficiency of the evidence to support the verdict, *Pruett v. Marshall*, 283 F. 2d 436, 438 (5th Cir., 1960); *Southern Railway Company v. Miller*, 285 F. 2d 202, 206 (6th Cir., 1960); *Rotondo v. Isthmian SS Co.*, 243 F. 2d 581, 582 (2nd Cir., 1957).

Where it is a party's contention that as a matter of law he was entitled to a verdict, nothing is present for consideration of the reviewing Court in the absence of a motion for directed verdict, *Strickland v. Perry*, 244 F. 2d 24 (5th Cir., 1957); *Harnik v. Lilley*, 167 F. 2d 159 (8th Cir., 1948); *Home Ins. Co. of N. Y. v. Davila*, 212 F. 2d 731 (1st Cir., 1954).

The importance of Rule 50 and compliance with its precise terms is forcefully demonstrated by the decision of this Court in *Johnson v. New York, New Haven & Hartford Railroad Co.*, 344 U. S. 48, where although the party had filed a motion for a directed verdict at the close of the evidence under Rule 50 which was denied by the Trial Judge, *but did not*, in his subsequent motions, expressly request "*to have judgment entered in accordance*

with his motion for a directed verdict'' as required by Rule 50(b), it was held that the Court of Appeals could not enter or direct the trial court to enter a judgment notwithstanding the verdict.

In the instant case the Petitioner not having filed a motion for a directed verdict as against any parties obviously could not and did not comply with the requirement of the Rules and his failure to do so is an indication that Petitioner was well aware that many factual conflicts were in the evidence. This is a further reason that this Court should not grant its extraordinary Writ.

III. This Court Cannot Be Expected to Grant Certiorari in Every Situation Where One Particular Court of Appeals Is Evenly Divided, Especially When There Is No Conflict Between Circuits Nor Within the Circuit Itself and the Case Involves a Narrow Resolution of a Factual Issue.

Petitioner's entire petition is based on the fact that certiorari should be granted because the Court of Appeals for the Third Circuit was evenly divided. This, of itself, can never be a reason for reviewing a case. Petitioner has cited no authority for such a proposition. Indeed, if this were a basis for granting certiorari, all appellate courts would have to be uneven in number or face the possibility of unending appeals.

Petitioner's cause must stand or fall on the merits of its case and respondent submits that the facts of the case were in dispute and were resolved by the jury with the result that this particular case has been decided. There is nothing unique about the specific facts of this case that would make them of such concern so as to invoke this Court's discretionary jurisdiction.

Petitioner's claim that the decisions in the Third Circuit are in conflict was fully argued before the Court of Appeals and the same arguments are repeated in the present Petition (Pet. 8, 9, 10). This claim of conflict in the deci-

sions within the Third Circuit will not bear analysis and the very cases that petitioner cites, clearly indicate that under the instructions of this Court, the present case was left to the jury and they quite properly resolved conflicts in the evidence in deciding whether or not the Stevedore performed its work properly.[3]

The *Thompson* case and the *Dolphin Tanker* case are of no aid to petitioners.[4] In both cases the factual evidence was of an entirely different kind than that offered in this case because the stevedore had knowledge of the dangerous condition and did nothing to rectify it, whereas in the present case, the shipowner conceded that the condition was not known to the stevedore.

Further, it is submitted that even if there was a conflict within the decisions of different panels within the Circuit, this alone would not merit the granting of the requested Writ, *U. S. ex. rel., Robinson v. Johnston,* 316 U. S. 649.

Finally, petitioner claims that there is a conflict between Circuits that must be resolved and that this case is the proper vehicle. This is totally without merit. The cases cited by petitioner deal with known hazardous conditions and evidence which did not raise factual issues. Such was not the present case.

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3. In *Hagens v. Farrell Lines, Inc.,* 237 F. 2d 477 (3rd Cir., 1956), the Third Circuit specifically referred to *Weyerhaeuser S. S. Co. v. Naciremá Operating Co.,* 355 U. S. 563, holding: "Whether the stevedoring company's conduct constituted a breach . . . was, of course, a question of fact for the jury." Similarly, in *Hodgson v. Lloyd Brasileiro Patrimonio Nacional,* 294 F. 2d 32 (3rd Cir., 1961), cert. den., 369 U. S. 848, the Third Circuit repeated: "The shipowner forgets that an appellate court will not interfere with a judgment entered on a verdict returned by a jury simply because of its opinion as to the weight or preponderance of the evidence."

4. *Thompson v. Trent Marine,* 353 F. 2d 632 (3rd Cir., 1965); *Dziedzina v. Dolphin Tanker Corp.,* 361 F. 2d 120 (3rd Cir., 1966).

CONCLUSION.

For the reasons stated in the Brief in Opposition to the Petition for a Writ of Certiorari, said petition should be denied.

Respectfully submitted,

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